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No. 85-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE AND ROCKLAND UTILITIES, INC., AND ROCHESTER GAS AND ELECTRIC CORPORATION,

Appellants,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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Question Presented

In *Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 447 U.S. 530 (1980), this Court held that an order of the New York Public Service Commission (the "Commission") prohibiting utilities from including in their billing envelopes bill inserts discussing controversial issues of public policy violated the utilities' freedom of speech protected by the First and Fourteenth Amendments. Subsequent to this decision, the Commission decided that, if the utilities include such bill inserts in their billing envelopes, it would disallow for ratemaking purposes one-half of the utilities' costs of the mailing.

The question presented in this case is whether the First and Fourteenth Amendments are violated by a Commission order that disallows for ratemaking purposes one-half of the utility's costs of mailing its bills if, and only if, the utility encloses in its billing envelope, at no cost to its customers, a message expressing its views on a controversial issue of public policy.

Listing of Parent Companies, Subsidiaries, and Affiliates

Pursuant to Rule 28.1 of the Supreme Court Rules, the following is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of the appellants:

Consolidated Edison Company of New York, Inc.—Honeoye Storage Corporation (a subsidiary corporation)

New York State Electric & Gas Corporation—None

Orange and Rockland Utilities, Inc.—None

Rochester Gas and Electric Corporation—None

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE AND ROCKLAND UTILITIES, INC., AND ROCHESTER GAS AND ELECTRIC CORPORATION,

Appellants,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

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JURISDICTIONAL STATEMENT

Appellants, Consolidated Edison Company of New York, Inc. ("Con Edison"), New York State Electric & Gas Corporation ("NYSEG"), Orange and Rockland Utilities, Inc. ("Orange and Rockland"), and Rochester Gas and Electric Corporation ("Rochester"), appeal from the final judgment of the New York Court of Appeals in this case, and submit this jurisdictional statement to show that the Supreme Court has jurisdiction and that this appeal presents a substantial federal question.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 66 N.Y.2d 369, —N.Y.S.2d— (1985), and is set forth in Appendix A hereto (1a-4a).* The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at 107 A.D.2d 73, 485 N.Y.S.2d 607 (1985), and is set forth in Appendix B hereto (5a-12a). The opinion of the New York Supreme Court, Albany County, is unreported and is set forth in Appendix C hereto (13a-16a). The order of the Commission is unreported and is set forth in Appendix E hereto (18a-24a).

JURISDICTION

This case involves a constitutional challenge to a state regulatory commission order on the ground that it violates the First and Fourteenth Amendments to the United States Constitution. The Court of Appeals upheld the constitutionality of the Commission's order.

The Court of Appeals' final judgment was rendered on December 17, 1985, and is set forth in Appendix D hereto (17a). The notice of appeal to this Court was filed with the Court of Appeals on February 19, 1986, and is set forth in Appendix F hereto (25a-27a). A copy of the notice of appeal was filed with the Supreme Court, Albany County, on February 19, 1986. This appeal is being docketed in this Court within 90 days of the date final judgment was rendered in the court below.

Jurisdiction to review the final judgment of the Court of Appeals in this case is conferred on this Court by 28 U.S.C. §1257(2). *Live Oak Water Users' Association v. Railroad Commission*, 269 U.S. 354, 356 (1926).

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* Parenthetical references denoted "(-a)" are to the appendix to this jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

Amendment I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Amendment XIV:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Commission order involved on this appeal (Case 27805, Order adopted on March 23, 1983)(23a) provides:

> Each utility which mails bill inserts to its ratepayers must, if the bill inserts contain messages as defined in Account 426.4 (for electric and gas utilities) [*] or Account 323.1 (for telephone utilities), charge the account with 50% of the costs of the mailing. All revenues (including any tax effects) associated with costs charged pursuant to this order will be placed in a deferred account. The deferred amounts shall be deducted from the utility's revenue requirement in its next rate proceeding.

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* Account 426.4 of the Commission's Uniform System of Accounts, [1986] 16 N.Y.C.R.R. Chapter II, Subchapter F, provides as follows:

> Expenditures for Certain Civic, Political and Related Activities
>
> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

STATEMENT OF THE CASE

The Factual Background

Con Edison, NYSEG, Orange and Rockland, and Rochester are electric and gas utility corporations whose rates and services are subject to Commission regulation. These utilities mail bills in billing envelopes to their customers for utility service, generally on a monthly basis. The billing envelopes contain several items. First and foremost, they contain the bill for service rendered to the customer. In addition, the billing envelopes contain a return envelope for customers' use in paying their bills.

The billing envelopes often also contain printed messages, called bill inserts. In some cases, the utilities' inclusion of a bill insert is required by law or by the Commission's regulations. For example, the Commission's regulations require utilities to send bill inserts to their customers with information about proposed major rate changes and Commission hearings to consider these changes. [1986] 16 N.Y.C.R.R. §136.80. The Commission also requires utilities to provide their customers with information regarding procedures for resolving service or billing disputes. [1986] 16 N.Y.C.R.R. §143.9. Bill inserts are also used to provide customers with information on topics such as safety matters, conservation measures, and utility and government-sponsored assistance programs.

In addition, on occasion, the utilities use bill inserts of the type that were involved in *Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 447 U.S. 530 (1980) (hereinafter cited as *Con Edison v. PSC)*, and are involved in this case: bill inserts that communicate to customers information and the utilities' views on controversial public issues relating to energy. Some of these issues, which are of concern and interest to both the utilities and their customers, are: the continued use of nuclear power as a source of energy; the conversion of oil-fired power plants to coal; the replacement of investor-owned utility service by government-owned facilities; and the siting of power plants. Such issues directly relate to the cost and quality of service the utilities provide to their customers.

There is often extra space in the billing envelope after the insertion of the bill, the return envelope, and the legally required messages. What this means is that one or more bill inserts on controversial public issues can usually be added to the billing envelope without incurring any mailing costs in addition to the amount that is required to mail the bill, the return envelope, and the legally required messages to the customer.*

The Proceedings Below

This case involves the Commission's second attempt to suppress the utilities' speech on public issues.** The Commission's first attempt, a total ban on the use of bill inserts "as a mechanism for the dissemination of the utility's position on controversial matters of public policy," was held to violate the First Amendment*** by this Court in *Con Edison v. PSC.*

Subsequently, the Commission instituted a second proceeding (the one involved on this appeal) to consider other means of regulating the utilities' use of bill inserts on public issues. Case 27805, *Proceeding on Motion of the Commission as to the Use of Bill Inserts and Promotion of Electricity*, Order adopted on July 16, 1980. At the end of this second proceeding, the Commission decided that if utilities enclose in their billing envelopes bill inserts expressing their positions on controversial

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* United States postal regulations permit the mailing of up to one ounce of material for the minimum first-class rate.

** This Court has held that speech on public issues is entitled to the highest degree of First Amendment protection. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

*** The First Amendment has been made applicable to the states by the Fourteenth Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 n.43 (1982).

issues of public policy,* it would disallow for ratemaking purposes one-half of the costs of the mailing. Order adopted on March 23, 1983 (18a-24a). The "costs of the mailing" that are subject to disallowance under the Commission's order are the costs of stamps, envelopes, processing, as well as assembling and updating ratepayer mailing lists (21a-22a).**

On August 5, 1983, the utilities commenced a special proceeding in New York Supreme Court, Albany County, pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR), and an action seeking to annul, vacate, and set aside the Commission's order, to declare that order unconstitutional, and to permanently enjoin its enforcement.

Supreme Court, Albany County, rejected the utilities' arguments that the Commission's order violates their freedom of speech and deprives them of their property without just compensation or due process of law, and denied the relief requested by the utilities (13a-16a).

The utilities then appealed to the Appellate Division, Third Judicial Department, of the New York Supreme Court. That court affirmed the judgment of the Supreme Court, Albany County. The Appellate Division held that the Commission's order is not a content-based restriction of speech and, thus, need not constitute a precisely drawn means of serving a compelling governmental interest (9a). Instead, the Appellate Division held that the Commission's order is a content-neutral restriction of speech that would be upheld if it met the less stringent rational basis test (9a). The court found a rational

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* The Commission considers the phrase "controversial matters of public policy" to be synonymous with the type of expenditures described in Account 426.4 of its Uniform System of Accounts. *See* p. 3, *supra*.

** The disallowed costs are substantial. For example, under the Commission's order, Con Edison would incur a penalty in excess of $240,000 (approximately 50 percent of its monthly postage costs for mailing its bills) each time it expresses its views by means of a bill insert on a controversial issue of public policy. *See* Record on Appeal to the Appellate Division, Third Department, p. 38. The actual penalty would be higher because it would include other costs of the mailing, such as envelopes, processing costs, and the costs of assembling and updating ratepayer mailing lists.

basis in the Commission's argument that, without its order, the utilities would be requiring ratepayers to subsidize the utilities' speech (10a). The court reached this conclusion despite the fact that the utilities' use of bill inserts does not increase their customers' rates by one penny. The court also concluded that the Commission's formula for determining the amount of disallowed billing costs was a reasonable exercise of the Commission's discretion (10a-11a).

Two Justices of the Appellate Division dissented on the ground that the Commission's order "unconstitutionally infringes upon [the utilities'] freedom of speech" (11a). The dissenting Justices recognized that the utilities' use of these bill inserts is at "no additional cost to ratepayers" (12a). For this reason, they concluded that the Commission's subsidy argument is not a sufficient justification for infringing the utilities' fundamental free speech rights (*id.*).

The New York Court of Appeals affirmed the order of the Appellate Division, holding that the disallowance of the billing costs at issue "does not violate the utilities' right of free speech under the Federal Constitution" (2a). The court rejected the utilities' argument that the Commission's order is an impermissible content-based restriction of speech (3a-4a). Rather, the court held that the order is content neutral and that it represents the proper exercise of the Commission's ratemaking power (4a).

The Court of Appeals also concluded that the Commission's order is justifiable because it reasonably balances the competing First Amendment interests of the utilities' shareholders and ratepayers by ensuring that ratepayers do not have "cause to complain that they were being compelled to subsidize and support the speech of the utilities in violation of the rule of *Abood v Detroit Bd. of Educ.* (431 US 209) and *Wooley v Maynard* (430 US 705)" (4a).

The utilities raised the question presented on this appeal at every stage of the proceedings below. The utilities alleged in

their Article 78 petition and complaint and argued in their briefs to each of the courts below that the Commission's order violates their constitutionally protected freedom of speech. The Court of Appeals considered and expressly rejected the utilities' constitutional argument (1a-2a).

THE QUESTION PRESENTED IS SUBSTANTIAL

I. This Appeal Warrants Plenary Review Because it Involves the Question Left Open by this Court in *Con Edison v. PSC* and Because the Commission's Order Undermines this Court's Decision in *Con Edison v. PSC*.

A. This appeal presents the question left open by this Court in *Con Edison v. PSC*.

This case warrants plenary review because it presents the precise question identified but left unanswered by this Court in *Con Edison v. PSC*. That question is whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), would be violated if the Commission did not allocate to utility shareholders any of the utilities' necessarily incurred billing costs whenever the utilities use bill inserts, at *no* cost to their ratepayers, to express their views on controversional issues of public policy. *See Con Edison v. PSC*, 447 U.S. at 543 n.13; *see also id.* at 544 (Marshall, J., concurring). This case presents the proper occasion for deciding this very important First Amendment issue.

B. The Commission's order undermines this Court's decision in *Con Edison v. PSC*.

Review of the Court of Appeals' decision is also warranted because, if allowed to stand, it would undermine this Court's decision in *Con Edison v. PSC*. In that case, this Court concluded that the "Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak." 447 U.S. at 535. The Court held that the Commission could "not be allowed to choose 'which issues are worth discussing or debating . . . .'" *Id.* at 538.

The Commission's order in this case applies to the same categories of speech as its previously invalidated ban. However, instead of prohibiting the use of these bill inserts, the Commission has now imposed a substantial financial penalty on their use by disallowing the rate recovery of one-half of the utilities' necessary billing expenses.* An unfettered power to impose a financial penalty on speech is a powerful tool for deterring speech.** The Commission is using this power to do precisely what this Court said it could not be allowed to do: choosing "which issues are worth discussing or debating." The Commission's order should be invalidated to ensure that the Commission does not do indirectly what this Court would not permit it to do directly. *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967).

II. This Appeal Warrants Plenary Review Because it Involves Important and Unresolved Questions Concerning the Extent of the Protection Afforded to Speech at the Core of the First Amendment.

A. The Court of Appeals erred in concluding that the Commission's order is not a content-based restriction of speech and in refusing to subject that order to strict judicial scrutiny.

Classifying a restriction of speech as content based or content neutral is essential in determining the level of judicial scrutiny to which it must be subjected. This Court has expressed great hostility to content-based restrictions of speech and has held that they must be subjected to the strictest judicial

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* As this Court has long recognized, the imposition of a financial penalty on speech may violate the First Amendment as much as an outright prohibition of speech. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976); *Follett v. McCormick*, 321 U.S. 573 (1944).

** The Appellate Division suggested that the Commission might disallow *all* of the utilities' billing expenses when they use bill inserts to speak on controversial issues of public policy (10a).

scrutiny. This Court has said that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 104 S. Ct. 3262, 3267 (1984).

The court below erred in concluding that the Commission's order is not a content-based restriction of speech. In *Con Edison v. PSC*, this Court determined that the Commission's ban on bill inserts was content based because the Commission banned the use of bill inserts only when they contained a message on a controversial issue of public policy, 447 U.S. at 537. The Commission order now under review applies to the *identical* categories of speech as the bill insert ban that was invalidated by this Court in *Con Edison v. PSC* and, thus, this order is also a content-based restriction of speech.

The Commission's order in this case is content based becaused the rate treatment of the costs of a particular mailing "cannot help but be based on the content of the [billing envelope] and the message it delivers." *Regan v. Time, Inc.*, 104 S. Ct. at 3267. Pursuant to the Commission's order, one-half of a utility's billing costs, which would otherwise be recoverable in full, will be disallowed for ratemaking purposes *only* if the utility includes in its billing envelope a bill insert on a controversial issue of public policy.

In other words, if the utility remains silent or speaks through bill inserts on a *non*-controversial issue, it will be allowed to recover from its customers all costs of mailing utility bills. However, if the utility chooses to speak on a *controversial* public issue by means of bill inserts, at no additional cost to its customers, the Commission will penalize the utility for this speech by disallowing one-half of the cost of mailing the utility bills. The costs of mailing are the same whether the message on the bill insert is about a non-controversial issue or about a controversial issue. Yet in one case, the Commission allows rate recovery of the entire cost of mailing bills; in the other case, the Commission disallows one-half of such costs. This differ-

ence in ratemaking treatment is based solely on the content of speech.

Relying on *Rochester Gas and Electric Corp. v. Public Service Commission*, 51 N.Y.2d 823 (1980), *appeal dismissed*, 450 U.S. 961 (1981), the court below concluded that the Commission's order is not content based because it is a ratemaking order (4a).* What the court below is suggesting is that ratemaking orders can not be content based. Under the court's rationale, orders that restrict speech, if they were ratemaking orders, would be exempt from strict First Amendment scrutiny. This dangerous conclusion should not be allowed to stand.

As the next section shows, if the Commission's order were properly characterized as content based, it would have to be invalidated.

B. The Commission's order does not meet the requirements applicable to content-based restrictions of speech.

Because the Commission's order is a content-based restriction of speech, the First Amendment requires that it must be subjected to the most exacting judicial scrutiny. *E.g., Con Edison v. PSC*, 447 U.S. at 540. This test of strict judicial scrutiny places the burden on the government to show two things:

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* *Rochester* upheld a Commission order refusing to allow the utility to recover from its customers all of its claimed advertising expenses. Whatever the merits of the *Rochester* decision, it is distinguishable on several grounds. First, the Commission order in *Rochester* was content neutral, whereas the Commission order in this case is content based. Second, the expenses in *Rochester* were found to be unnecessary to the rendition of utility service, whereas the expenses in this case are necessary to the rendition of utility service. Third, acceptance of the utility's position in *Rochester* would have resulted in an increase in rates to the utility's customers, whereas acceptance of the utilities' position in this case would not require an increase in rates to their customers.

(1) that the restriction of the First Amendment right is necessary or essential to accomplish a compelling governmental interest, *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Con Edison v. PSC*, 447 U.S. at 540; *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 99 (1972); and

(2) that the means employed are "closely drawn to avoid unnecessary abridgement of [First Amendment] freedoms," *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), because "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

The Commission has not satisfied either of these requirements in this case.

1. The Commission's order does not serve a compelling governmental interest.

In order to justify its content-based restriction of the utilities' speech, the Commission must demonstrate that its order is necessary to serve a compelling governmental interest. The justification advanced by the Commission for its order is the perceived need to eliminate the alleged subsidy "utility management receives . . . for the dissemination of its views when it uses the billing process to send political messages to ratepayers" (20a).

The court below accepted the Commission's rationale, concluding that if the costs at issue "were not allocated the ratepayers might have cause to complain that they were being compelled to subsidize and support the speech of the utilities in violation of the rule of *Abood v Detroit Bd. of Educ.* (431 US 209) and *Wooley v Maynard* (430 US 705)" (4a). The reliance of the Court of Appeals on these cases is misplaced.*

* *Wooley v. Maynard*, 430 U.S. 705 (1977), held that an individual may not be compelled to carry a government-dictated message on his private property. That holding is distinguishable because this case involves the right of the utilities to convey their own messages by the use of their own property. *See* pp. 14-15, *infra*.

In *Abood*, this Court held that under the First Amendment public sector employees may not be compelled to finance the political activities of their union as a prerequisite to employment, if the union's activities are *unrelated* to its duties as exclusive bargaining representative. 431 U.S. at 234. However, this Court also held in *Abood* that employees have no First Amendment right to refuse to finance union political activities if such activities are *related* to the union's collective bargaining activities. *Id.* at 222-23. The *Abood* decision will not support the Commission's order whether or not the bill inserts relate to the utilities' business.

(a) Bill inserts on issues related to the utilities' business

Even if it were assumed that the use of bill inserts requires utility customers to subsidize utilities, a point the utilities dispute, *Abood* makes it clear that utility customers have no First Amendment right to refuse to finance the utilities' speech that is related to their business. And, indeed, most, if not all, of the bill inserts the utilities would mail to their customers would address issues that are related to their business. Accordingly, the Court of Appeals' reliance on *Abood* is misplaced to the extent that the Commission's order applies to messages related to the utilities' business.

(b) Bill inserts on issues unrelated to the utilities' business

The reliance of the court below on *Abood* is also misplaced with regard to bill inserts that are unrelated to the utilities' business because the utilities' use of bill inserts in the circumstances of this case does not require ratepayers to subsidize the utilities' speech.

The cost of utility service to customers is the same whether or not the bill inserts at issue are included in the billing envelopes. That is so because the costs the utilities are seeking to recover are the minimum costs of mailing bills to their customers, and the addition to the billing envelopes of the bill inserts at issue will not increase the costs of the mailing.* Even

* It should be noted that, under the Commission's policy, the utilities' shareholders are required to pay all costs other than "mailing

the Commission appears to acknowledge that the use of bill inserts by utilities will cost customers nothing (20a). *Statement of Policy on Advertising and Promotional Practices of Public Utilities*, Order Denying Petitions for Rehearing, 17 NY PSC 17-R, 23-R n.6 (1977).

Abood recognized a constitutional right not to be compelled to subsidize the political views of others in certain cases. This doctrine should not be stretched to cover a situation in which the objecting party incurs no cost and the speaking party is using its own property. For example, *Abood* does not suggest that a dissenting union member may avoid paying the portion of the dues that covers office rent if political issues unrelated to the union's functions are discussed in the union offices that are essential to performing union functions. If *Abood* were extended to require the elimination of such no-cost subsidies of speech, speech on public issues would be greatly diminished.

The court below pejoratively characterized the utilities' use of the billing process as a "free ride on the backs of the ratepayers" (3a). However, this "free-ride" cannot be equated to a ratepayer subsidy of the utilities' speech. This "free ride" is no more than the utilities' using their own property at no additional cost to their ratepayers to convey a constitutionally protected message. Any economic benefit received by the utilities from the use of their billing facilities is solely an incident of their ownership of such facilities. Indeed, this Court has squarely rejected the notion that customers of a utility

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costs" attributable to the preparation of bill inserts on controversial issues of public policy. *Statement of Policy on Advertising and Promotional Practices of Public Utilities*, 17 NY PSC 1-R, 4-R—5-R, *reh'g denied*, 17 NY PSC 17-R (1977). The treatment of such costs is not at issue on this appeal. Rather, the question on this appeal is the constitutionality of the Commission's determination that a portion of the utilities' legitimate and necessary operating expenses (one-half of the cost of mailing bills to customers) be disallowed for ratemaking purposes when the utility includes in its billing envelope a bill insert on a controversial issue of public policy.

acquire an ownership interest in the property of the utility by paying for service:

> The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. . . . The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses, including the expense of depreciation, is the company's compensation for the use of its property.
>
> * * *
>
> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for services they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stock.

Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 31-32 (1926) (citation omitted). In fact, in *Con Edison v. PSC*, this Court specifically indicated that the billing envelopes are utility property:

> [Con Edison] seeks merely to utilize its *own* billing envelopes to promulgate its views on controversial issues of public policy.

447 U.S. at 540 (emphasis added).*

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* The Commission's order must also be invalidated because it violates the utilities' property interests in their billing envelopes that are protected by the Fifth and Fourteenth Amendments. By disallowing the recovery in rates of expenses necessarily incurred to provide utility service, the Commission has denied the utilities an opportunity to earn a fair rate of return and, as a result, has deprived the utilities of their property without just compensation or due process of law. *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63 (1935).

In sum, because the Commission has failed to establish that the utilities' use of bill inserts requires ratepayers to subsidize the utilities' speech, its order does not serve a compelling governmental interest. Elimination of a "subsidy" that costs ratepayers nothing does not constitute a compelling governmental interest.

2. The Commission's order is not a precisely drawn means of serving the alleged governmental interest.

Even if the use of bill inserts involved subsidization of utilities by their customers, a point the utilities dispute, the remedy adopted by the Commission for the elimination of any such subsidy does not meet the constitutional standard of precision. The court below concluded that the "50-50 division of costs made by the PSC was reasonable and within its discretion" (4a). However, in reaching this determination, the court applied the wrong standard of review.

The court below employed the rational basis test in reviewing the Commission's order, the test employed in reviewing ordinary ratemaking orders. Yet, as discussed at pp. 11-12, *supra*, this Court has insisted that content-based restrictions of speech must be subjected to exacting judicial scrutiny and that "precision of regulation" is essential when the government regulates protected First Amendment activities. *See NAACP v. Button*, 371 U.S. 415.

The Commission's order is not a precisely drawn means of serving the alleged governmental interest in eliminating a subsidy. *See, e.g., Secretary of State v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2852 n.14 (1984); *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 637-39 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. at 786. The Commission's cost-allocation formula bears no relationship to the alleged subsidy the Commission is attempting to eliminate. The so-called subsidy could be far more or far less than the amount of costs disallowed by the Commission. The Commission will disallow fifty percent of the cost of mailing bills

whether the public-issue message included in the billing envelopes is one line or four pages. And the Commission will disallow fifty percent of the cost of mailing bills whether the public-issue message constitutes ten percent or ninety percent of the contents of the billing envelopes. Accordingly, because it fails to meet the constitutional standard of precision, the Commission's arbitrary formula should be invalidated.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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February 1986

Appendix A—Opinion of the Court of Appeals of the State of New York, December 17, 1985

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.,

Appellants,

v

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

(And Another Action.)

OPINION OF THE COURT

Argued November 11, 1985; decided December 17, 1985

Peter Garam, Joy Tannian, Celeste A. Contrucci, Frederic H. Lawrence, Kenneth M. Jasinski, Kenneth D. Archer and *Richard N. George* for appellants.

Timothy P. Sheehan and David E. Blabey for respondent.

Per Curiam.

The determination of respondent Public Service Commission (PSC)—that when petitioner utilities enclose political

messages with billing statements their shareholders must pay 50% of fixed costs associated with preparing and mailing those statements to ratepayers—does not violate the utilities' right of free speech under the Federal Constitution.

In *Consolidated Edison Co. v Public Serv. Commn.* (447 US 530), the Supreme Court struck down a prior PSC determination prohibiting utilities from including bill inserts that expressed views on controversial public policy issues as violative of the utilities' right of free speech under the 1st Amendment (US Const 1st Amend). The court, however, specifically left open the question whether the PSC could constitutionally allocate, between shareholders and ratepayers, the costs of bill inserts addressing controversial issues of public policy (447 US, at p 543, n 13; *see also, id.*, at p 544 [Marshall, J., concurring]).

Following the court's decision, the PSC instituted proceedings and invited comments regarding possible other action with respect to bill inserts. On March 23, 1983, the PSC issued an order providing that, if utilities enclosed inserts concerning matters defined in Account 426.4* with billing statements, 50% of many fixed costs associated with preparation and mailing of those statements would be allocated to the utilities' shareholders. In arriving at this decision, the PSC concluded that

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* Account 426.4, 16 NYCRR, ch II, subch F (Account 323.1 for telephone utilities) provides:

Expenditures for Certain Civic, Political and Related Activities.

"This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations."

otherwise the ratepayers would in effect be subsidizing utility management: "[In 1977] we concluded that utility management receives a subsidy for the dissemination of its views when it uses the billing process to send political messages to ratepayers. Nothing has happened since that time to persuade us that our finding is incorrect. In the extensive litigation following our 1977 Statement of Policy no party has contended that a utility does not derive an economic benefit by using the billing process (whose costs are paid for by ratepayers) as opposed to alternative means to disseminate political messages. We therefore continue to conclude that using the billing process provides a subsidy to utility management."

One of the PSC's duties is to insure that the public receives utility services at charges that are "just and reasonable" (Public Service Law § 65[1]). In setting rates, "a prime function of the commission, as a regulatory body, is to separate those costs which should be borne by ratepayers from those which are properly chargeable to shareholders." (*Rochester Gas & Elec. Corp. v Public Serv. Commn.*, 51 NY2D 823, 825, *appeal dismissed* 450 US 961.) In *Rochester Gas* we held that the PSC did not violate the utility's 1st Amendment rights by refusing to include a portion of the utility's informational advertising, which the PSC found was unnecessary to the furnishing of utility services, as an allowable expense; the Constitution does not require the PSC "to allow the utility to charge ratepayers for all communications which the utility may choose to make" (51 NY2d, at p 825).

Rochester Gas is controlling here. Although this case involves the allocation of fixed rather than marginal costs, the principle is the same: nothing in the Constitution requires that the shareholders get a free ride on the backs of the ratepayers.

Petitioner claims that respondent's ruling is invalid because Account 426.4 is impermissibly based on the content of speech.

In fact, however, the thrust of the regulation is to distinguish between expenditures that primarily advance the interests of the corporation (properly chargeable to the shareholders) and expenditures that primarily advance the interests of the ratepayers (properly chargeable to them) *(cf.* 16 NYCRR 136.80, 143.9). In making this distinction, the PSC was therefore only implementing its statutory and regulatory mandate, and the case is indistinguishable from *Rochester Gas,* in which the PSC allocated expenses based on its determination whether the advertising was "unnecessary to the furnishing of utility services" (51 NY2d, at p 825); *see also, Southwestern Elec. Power Co. v Federal Power Commn.* (304 F2d 29, 47, *cert denied sub nom. Alabama Power Co. v Federal Power Commn.* 371 US 924).

Finally, PSC's ruling also represented a proper attempt to balance competing 1st Amendment interests of the shareholders and the ratepayers. If costs were not allocated the ratepayers might have cause to complain that they were being compelled to subsidize and support the speech of the utilities in violation of the rule of *Abood v Detroit Bd. of Educ.* (431 US 209) and *Wooley v Maynard* (430 US 705). (*See, Consolidated Edison Co. v Public Serv. Commn.,* 447 US, at p 543, n 13, *supra; id.,* at p 544 [Marshall, J., concurring]; *id.,* at p 549 [Blackmun and Rehnquist, JJ., dissenting].) As the dissenting Justices noted in *Consolidated Edison,* "[e]ven though the free ride may cost the ratepayers nothing additional by way of specific dollars, it still qualifies as forced support of the utility's speech" (447 US, at p 552).

In these circumstances, the 50-50 division of costs made by the PSC was reasonable and within its discretion.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge WACHTLER and Judges JASEN, MEYER, SIMONS, KAYE, ALEXANDER and TITONE concur in Per Curiam opinion.

Order affirmed, with costs.

Appendix B—Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, February 21, 1985

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al., Appellants v PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, Respondent.

Third Department, February 21, 1985

SUMMARY

APPEAL from a judgment of the Supreme Court at Special Term (Joseph P. Torraca, J.), entered March 26, 1984 in Albany County, which, in a combined proceeding pursuant to CPLR article 78 and action for a declaratory judgment, denied an application by petitioners to annul a determination of the Public Service Commission allocating the costs of certain bill inserts between petitioners' ratepayers and shareholders.

HEADNOTE

Public Utilities—Cost of Customer Service Bill Inserts—Expression of Utility's Views on Controversial Issues

The Public Service Commission of the State of New York (PSC) cannot prohibit utility companies from including inserts which express the views or opinions of the utility on controversial issues of public policy in envelopes containing service bills to customers (US Const, 1st amend). However, the utility companies' right to freedom of speech is not abridged by a PSC order directing that shareholders and ratepayers share on a 50-50 basis the costs of such mailings, including stamps, envelopes and processing costs and the costs of assembling and updating ratepayers mailing lists; the order is not a content-based

restriction and, thus, need not provide a precisely drawn method of serving a compelling State interest. Further, the PSC is empowered to consider the "nonutility" use of assets, including a utility plant or the nature of company expenditures, and to take appropriate rate-making action to ensure that ratepayers are not compelled to pay for the cost of such activities or expenditures; finally, the cost allocation formula adopted by the PSC is not an unreasonable means of treating costs and should be upheld as proper application of its technical expertise and judgmental powers.

APPEARANCES OF COUNSEL

Joy Tannian, Peter Garam and *Celeste A. Contrucci* for Consolidated Edison Company of New York, Inc., appellant.

Huber, Lawrence & Abell (*Frederic H. Lawrence* and *Kenneth M. Jasinski* of counsel), for New York State Electric & Gas Corporation, appellant.

Kenneth D. Archer for Orange and Rockland Utilities, Inc., appellant.

Nixon, Hargrave, Devans & Doyle (*Richard N. George* of counsel), for Rochester Gas and Electric Corporation, appellant.

David E. Blabey (*Timothy P. Sheehan* of counsel), for respondent.

OPINION OF THE COURT

WEISS, J.

On June 20, 1980, the United States Supreme Court held that when the Public Service Commission of the State of New York (PSC) prohibited utility companies from including inserts which expressed the views or opinions of the utility on controversial issues of public policy in envelopes containing service bills to customers, the PSC violated the US Constitution, 1st Amendment, as applied to the States through the 14th Amendment (*Consolidated Edison Co. v Public Serv. Commn.*, 447 US 530) (hereinafter *Consolidated Edison*). The decision left unresolved the question of whether the use of the billing process by a utility management for dissemination of its views and opinions on political or ideological issues, or to promote its interests, amounted to a forced subsidy from ratepayers and, if so, whether there should be an allocation of the costs between shareholders and ratepayers to avoid such subsidization, as well as the methodology to be employed for such allocation (*Consolidated Edison, supra*, p 543, n 13; p 544 [Marshall, J. concurring]).

A proceeding was commenced by the PSC on July 16, 1980 culminating in a March 23, 1983 order which determined that: "Each utility which mails bill inserts to its ratepayers must, if the bill inserts contain messages defined in Account 426.4 (for electric and gas utilities) or Account 323.1 (for telephone utilities, [1] charge the account with 50% of the costs of the

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[1] The Uniform System of Accounts includes account 426.4 (for electric and gas utilities), which is found in 16 NYCRR ch II, subch F, art 1, Income Accounts, and account 323.1 (for telephone and telegraph utilities), which is found in 16 NYCRR ch VI, subch E, art 1, Income Accounts. Both accounts are entitled "Expenditures for Certain Civic, Political and Related Activities" and state: "This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation, or ordi-

mailing. All revenues (including any tax effects) associated with costs charged pursuant to this order will be placed in a deferred account. The deferred amounts shall be deducted from the utility's revenue requirement in its next rate proceeding."

In effect, the PSC determined that the costs be borne on a 50-50 basis with shareholders and ratepayers sharing equally those costs including stamps, envelopes, processing costs, and the costs of assembling and updating ratepayers mailing lists. The formula for the cost of maintaining and updating the mailing lists was to be determined as follows: "each utility shall multiply the number of bills used for political messages divided by 12 (six if the company bills bi-monthly) times 50% of the cost of maintaining its billing list for such years". This sum would be allocated and deferred (added to accounts 426.4 and 323.1).

Petitioners, electric and gas utilities, thereupon commenced a combined CPLR article 78 proceeding, seeking annulment and vacatur of the March 23, 1983 PSC order, and an action for declaratory judgment, declaring that said order is violative of the US Constitution, 1st, 5th and 14th Amendments and the NY Constitution, article I, §§ 6, 7, 8 and for judgment enjoining enforcement of said order. Special Term denied the relief sought in both the petition and verified complaint. Petitioners' direct appeal to the Court of Appeals was transferred to this court by the Court of Appeals, which noted that "[a] direct appeal does not lie where it does not involve a statutory provision" (62 NY2d 912, 913).

Petitioners initially argue that the PSC order abridges their freedom of speech because it is a content-based restriction on noncommercial speech protected by the 1st Amendment, in that they are compelled to pay one half of the mailing costs when

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nances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations."

the message inserted into the bill packet espouses their views on controversial issues of public policy whereas there is no charge when a message deals with noncontroversial subjects. They argue that this practice is expressly prohibited by the *Consolidated Edison* case (*supra*). We disagree. In our view, the order is not a content-based restriction, and thus need not provide a precisely drawn method of serving a compelling State interest. The order in no way restricts petitioners from utilizing bill packet inserts to disseminate their views on controversial subjects. It merely holds that when a utility bootstraps its message onto a vehicle fully paid for by the recipient customers, it should then share equally in the cost of that mailing. Moreover, proportionate allocation effects the PSC's prime function of "separat[ing] those costs which should be borne by ratepayers from those which are properly chargeable to shareholders" (*Rochester Gas & Elec. Corp. v Public Serv. Commn.*, 51 NY2d 823, 825, *appeal dismissed* 450 US 961). Such determinations will not be set aside by this court absent a showing, not here present, that a rational basis in the record is lacking (*see, Matter of Cohalan v Gioia*, 88 AD2d 722, 723).

Although utilities are clearly entitled to insert printed materials in the billing envelopes expressing their views on controversial public policy issues, no corresponding duty exists on the part of government or the ratepayers to bear the cost burdens necessary to realize that right (*see, Harris v McRae*, 448 US 297, 317, n 19). While petitioners readily acknowledge that they are responsible for incremental costs (additional postage due, cost of printing and inserting into bill envelopes) incurred by inclusion of their messages, they contend that any requirement that they pay one half of the amount of the basic costs (normal postage and bill insertion) results in impermissible taxation. It is clear that a public utility cannot include in its rate base the costs of political advertising and lobbying since customers derive no service-related benefits from such materials (*Consolidated Edison, supra*, p 550 [Blackmun, J., dissenting]). Since the benefits of disseminating such information inure to the utility's shareholders, so also should the costs (*see, South-*

western Elec. Power Co. v Federal Power Commn., 304 F2d 20, *cert denied sub nom. Alabama Power Co. v Federal Power Commn.*, 371 US 924).

Without the subject order, there is imposed upon ratepayers a subtle, indirect subsidization of the transmittal of management's controversial or political views. The PSC is empowered to consider the "nonutility" use of assets including a utility plant or the nonutility nature of company expenditures, or to take appropriate rate-making action to ensure that ratepayers are not compelled to pay for the cost of such activities or expenditures (*see, Rochester Gas & Elec. Corp. v Public Serv. Commn., supra*, p 825; *Matter of New York Tel. Co. v Public Serv. Commn.*, 64 AD2d 232, 247-248, *lv denied* 46 NY2d 710; *Matter of New York Water Serv. Corp. v Public Serv. Commn.*, 12 AD2d 122, 128-129, *lv denied* 10 NY2d 705). Petitioners contend that they should be entitled to a "free ride" when the cost of mailing a bill packet is not increased by the insertion of their informational literature. As noted by Justice Blackmun, "[e]ven though the free ride may cost the ratepayers nothing additional by way of specific dollars, it still qualifies as forced support of the utility's speech" (*Consolidated Edison, supra*, p 552 [Blackmun, J., dissenting]). This court has previously reached a similar conclusion (*Matter of Consolidated Edison Co. v Public Serv. Commn.*, 63 AD2d 364, 367-368, *affd* 47 NY2d 94, *revd on other grounds* 447 US 530). Indeed, the converse of petitioners' logic might just as easily be utilized to suggest that whenever petitioners insert literature expressing management's views on controversial issues affecting the public or upon political issues, the ratepayers be given a "free ride" for their service bills, assuming only incremental costs while shareholders bear the fixed costs of mailing (*Consolidated Edison, supra*, p 556 [Blackmun, J., dissenting]). Accepting petitioners' thesis, no true complaint could be registered by the shareholders since only a "subtle and indirect subsidization" would be imposed upon them.

Finally, the cost allocation formula adopted by the PSC is not an unreasonable means of treating costs and should be

upheld as a proper application of its technical expertise and judgmental powers (*see, Rochester Gas & Elec. Co. v Public Serv. Commn., supra*, p 825; *Matter of New York Tel. Co. v Public Serv. Commn.*, 98 AD2d 535, 538; *Matter of Brooklyn Union Gas Co. v Public Serv. Commn.*, 101 AD2d 453, 457). There is no noxious nostrum present here. The PSC has adopted an alternate position in which the respective parties must bear an equitable share of the fixed mailing costs.[2] The position reached is a rational resolution of a complex cost allocation issue. It must be remembered that the issue arises not out of the rendition of utility services to customers, but rather solely because petitioners seek to impress their own political and ideological views upon their customers in addition to their business of selling energy services.

MAIN, J. P. (dissenting). We respectfully dissent. At the outset, we agree with the observation of Justice Blackmun and recognize that the cost allocation issue presently confronting us is difficult (*Consolidated Edison Co. v Public Serv. Commn.*, 447 US 530, 554 [Blackmun, J., dissenting]). After careful consideration of this closely contested issue involving sharply competing values, we are of the view that the order of the Public Service Commission (PSC) unconstitutionally infringes upon petitioners' freedom of speech.

We recognize that this case does not involve the proportioning of costs such that the cost attributable to the placing of the controversial bill inserts in the envelopes and the mailing of the controversial bill inserts is charged to shareholders instead of ratepayers. Petitioners acknowledge that they (or more precisely, their shareholders) are responsible for those costs which would not be incurred but for the inclusion of the controversial bill insert. This case does involve a more subtle and indirect subsidization, one which arises from petitioners'

2. Even under this formula, petitioners' distribution costs would be less than they would otherwise be if separate, independent distribution means were used, thus effecting a partial free ride to management (*Consolidated Edison, supra*, p 554 [Blackmun, J., dissenting]).

ability to utilize a preexisting distribution system at no additional cost to ratepayers and thereby to avoid expenses which would be incurred if dissemination was accomplished by other means. Such subtlety and indirectness distinguish this case from such cases as *Abood v Detroit Bd. of Educ.* (431 US 209) and *Rochester Gas & Elec. Corp. v Public Serv. Commn.* (51 NY2d 823, *appeal dismissed* 450 US 961), which involved impermissible attempts by entities to require direct financial support from members and ratepayers for political activities and advertising, respectively. In the absence of direct financial support in this case, we do not find the holdings of these cases persuasive.

The compelling State interest relied on by the PSC to support the constitutionality of its order is the prevention of subsidization of petitioners' views on controversial issues of public policy by those who may not support those views. We have already described, however, that the subsidization in this case is indirect and slight—amounting only to petitioners' taking advantage of a distribution mechanism already in place without causing any increase in the amount paid by ratepayers and without impermissibly invading the ratepayers' right to privacy (*see Consolidated Edison Co. v Public Serv. Commn.*, 447 US 530, 541-542, *supra; Cohen v California*, 402 US 15). Considering the fundamental nature of petitioners' freedom of speech rights, the minimal, indirect subsidization which results from petitioners' exercise of those rights, and the potential for unduly restricting petitioners' exercise of those rights, we conclude that the justification offered by the PSC to support its cost allocation order is insufficient. Petitioners' 1st Amendment rights, and corresponding free speech rights under the State Constitution, are sufficiently strong and fundamental to withstand the limited and indirect subsidization present in this case.

Accordingly, we would conclude that the PSC's order violates petitioners' freedom of speech and that the judgment appealed from should be reversed.

MIKOLL and YESAWICH, JR., JJ., concur with WEISS, J.; MAIN, J. P., AND HARVEY, J., dissent and vote to reverse in an opinion by MAIN, J. P.

Judgment affirmed, with costs.

Appendix C—Opinion of the New York Supreme Court, Albany County, January 26, 1984

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE AND ROCKLAND UTILITIES, INC., and ROCHESTER GAS AND ELECTRIC CORPORATION,

Petitioners,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE AND ROCKLAND UTILITIES, INC., and ROCHESTER GAS AND ELECTRIC CORPORATION,

Plaintiffs,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Defendant.

Albany County Special Term, November 18, 1983, Motion Number 73
(Final Papers Submitted December 2, 1983)

(JUSTICE JOSEPH P. TORRACA, Presiding)

APPEARANCES: Tannian, Garam & Farrelly, Esqs., Attorneys for Petitioner Consolidated Edison, 4 Irving Place, New York, New York 10003

Huber, Lawrence & Abell, Esqs., Attorneys for Petitioner New York State Electric & Gas, 99 Park Avenue, New York, New York 10016

Kenneth D. Archer, Esq., Attorney for Petitioner Orange & Rockland Utilities, One Blue Hill Plaza, Pearl River, New York 10965

Nixon, Hargrave, Devans & Doyle, Esqs., Attorneys for Petitioner Rochester Gas & Electric, Lincoln First Tower, Rochester, New York 14603

David E. Blabey, Esq., Counsel to the Public Service Commission, Three Rockefeller State Plaza, Albany, New York 12223

TORRACA, J.:

The Public Service Commission of the State of New York, by order dated March 23, 1983, directed utilities using bill inserts in their billings for political purposes to share the cost of mailing between their rate payers and their share holders. Petitioners request judgment annulling and setting aside such order.

In brief, petitioners first argue that the commission's order is violative of utilities' constitutionally protected freedom of expression. However, an examination of the facts here presented indicates that they are not being prohibited from expressing their viewpoints and, unlike the earlier case of *Consolidated Edison Company of New York, Inc. v. Public Service Commission* (447 U S 530), they are not being prevented from using

bill inserts. Petitioners are merely being asked to bear an equitable share of the costs of mailing when they use bill inserts which are primarily for the benefit of stockholders. Nor can it be said that they are being penalized or taxed. The cost involved is a specific portion of the actual cost of the mailing and petitioners are merely being prevented from appropriating a right which they do not already have.

Petitioners' second contention is that the commission's order constitutes a taking of the utilities' property without just compensation and without due process of law. That theory clashes head on with the fact that the Public Service Commission has been established to regulate utilities and, in particular, to regulate the format and content of billings. These are controls which are absent in other "ordinary" corporations and businesses. Accordingly, any analogy between the regulation of the utility and other businesses limps very badly.

Furthermore, the Supreme Court in the earlier case of *Consolidated Edison Company of New York, Inc., v. Public Service Commission* (supra) seemed to be acknowledging the very authority here exercised by the Public Service Commission when it stated:

> "Finally, the Commission urges that its prohibition would prevent ratepayers from subsidizing the costs of policy-oriented bill inserts. But the Commission did not base its order on an inability to allocate costs between the shareholders of Consolidated Edison and the ratepayers. Rather, the Commission stated that 'using bill inserts to proclaim a utility's viewpoint on controversial issues (*even when the stockholder pays for it in full*) is tantamount to taking advantage of a captive audience. . . ' App to Juris Statement 43a (emphasis added). Accordingly, there is no basis on this record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base. Mere speculation of harm does not constitute a compelling state interest. See Mine Workers v. Illinois Bar Assn., 389 U S 217, 222-223, 19 L Ed 2d 426, 88 S Ct 353, 42 Ohio Ops 2d 394 (1967)." (65 L Ed 2d 332).

In view of the foregoing, the petition is denied.

Submit judgment accordingly.

Dated: January 26, 1984
Kingston, New York

(Order to be submitted by David E. Blabey, Esq.)

Appendix D—Final Judgment of the Court of Appeals of the State of New York, December 17, 1985

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

No. 632

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.,

Appellants,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

(and another action.)

REMITTITUR

The appellant(s) in the above entitled appeal appeared by Tannian, Garam and Contrucci, Esqs.; Huber, Lawrence & Abell, Esqs.; Kenneth D. Archer; and Nixon, Hargrave, Devans & Doyle, Esqs.; the respondent appeared by David E. Blabey.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion Per Curiam. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye, Alexander and Titone concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

Court of Appeals, Clerk's Office, Albany
December 17, 1985

Appendix E—Order of the Public Service Commission of the State of New York, March 23, 1983

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission
held in the City of Albany
on March 23, 1983

COMMISSIONERS PRESENT:
PAUL L. GIOIA, Chairman
EDWARD P. LARKIN
CARMEL CARRINGTON MARR
HAROLD A. JERRY, JR.
ANNE F. MEAD
RICHARD E. SCHULER

CASE 27805—Proceeding on Motion of the Commission as to the Use of Bill Inserts and Promotion of Electricity.

BY THE COMMISSION:

By order dated December 11, 1980, the Commission requested comments concerning methods of cost allocation between ratepayers and shareholders when a utility encloses a billing insert to promote the interests of its management. A list of parties submitting comments is attached as Appendix A. Although the Commission's Uniform System of Accounts (16 NYCRR, Account 426.4; Account 323.1 for telephone utilities)* provides that the costs of producing political and related

* Account 426.4 states:

426.4 Expenditures for Certain Civic, Political and Related Activities.

This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation

bill inserts must be allocated to shareholders, the Commission is concerned that use of the billing process would amount to a subsidy from the utilities' ratepayers.* We therefore proposed four possible methods of cost allocation for consideration by the parties:

(1) Allocation of so much of the cost to shareholders as a third party would be willing to pay to distribute its material with the utilities' bills;

(2) Allocation of the full costs of a mailed bill and insert, according to a set formula, between shareholders and ratepayers when the bill insert contains political messages. In this case, costs to be allocated would include: stamps, envelopes, processing costs and the cost of assembling and updating ratepayer mailing lists;

(3) Allocation of cost to shareholders that the utility avoids by using inserts rather than another advertising medium; and

(4) Allocation of all the costs of a mailing to the shareholders if the mailing contains a political message.

As a corollary matter, the Commission was also concerned with the difficulties of implementing particular cost methodologies.

The utility parties commenting on cost allocation proposals were unanimous in their opposition to any allocation methodology that would allocate more costs to shareholders than already provided by Account 426.4. The utility parties reject any notion that they receive a subsidy from ratepayers through the use of

---

or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decision of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

* The Commission's authority to deal with the subsidy problem was recognized by the United States Supreme Court in *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 543 (1980).

the ratepayer—financed billing process when they enclose messages promoting the political interests of utility management. Some utilities go so far as to claim that any allocation of more than the incremental cost of producing the bill insert would be an unconstitutional burden on their freedom of speech. All of the utilities point to problems with defining which inserts are to be defined as political in nature and with implementing the cost allocation proposals contained in the Commission's order.

On the other hand, the non-utility parties (the Borough of Manhattan and Long Island Consumer Action, the Empire State Petroleum Association, the New York State Consumer Protection Board and Mr. Thomas Suttmeier) noted that the use of the billing process by the utilities provides a no cost mechanism to utility management to express its views on political matters, and they urged that some or all of the cost of a mailing containing a political insert be allocated to shareholders.

In our order denying petitions for rehearing to our Statement of Policy on Advertising and Promotional Practices of Public Utilities issued February 25, 1977 we concluded that utility management receives a subsidy for the dissemination of its views when it uses the billing process to send political messages to ratepayers. Nothing has happened since that time to persuade us that our finding is incorrect. In the extensive litigation following our 1977 Statement of Policy no party has contended that a utility does not derive an economic benefit by using the billing process (whose costs are paid for by ratepayers) as opposed to alternative means to disseminate political messages. We therefore continue to conclude that using the billing process provides a subsidy to utility management.

The parties commented on each of the cost allocation approaches contained in our December 16, 1980 order. No party supported an allocation of costs to shareholders that a third party would be willing to pay or the costs that a utility avoids by using bill inserts rather than another medium. The utilities pointed to difficulties in implementing the cost ap-

proaches and noted their essentially subjective nature. We agree that either approach would be likely to cause more difficulty than it would be worth especially considering the minor amounts of money apt to be involved.

The other two approaches suggested in our order, either a sharing of costs in accordance with a predetermined formula or allocation of all costs to shareholders, are clearly more practical alternatives. Since allocation of all costs to shareholders would not recognize that the utility is providing a service related function when it sends out its bill, the Commission concludes that a reasonable means of treating costs would be to adopt the proposal advocated by the Empire State Petroleum Association for a 50-50 sharing. In our view, when a billing is used both for service related functions and for management purposes, it may properly be considered a joint use with costs to be shared by both parties.

We now turn to several problems of implementation of the cost sharing formula. First, several utilities noted that there would be disputes over which bill inserts were political. While we cannot predict the degree to which debates will arise, it is our intention that only bill inserts whose costs are properly accountable under Account 426.4 will cause a mailing's cost to be allocated 50% to the shareholders. Our order here, therefore, conforms to a longstanding definition under the Commission's Uniform System of Accounts.

Second, the question arises as to what costs should be included in an allocation formula. In our order we noted that items to be considered for allocation would be stamps, envelopes, processing costs and the costs of assembling and updating ratepayers mailing lists. Consolidated Edison Company of New York, Inc. notes that its customer list is used for many purposes other than sending out bills and that only a portion of the cost of updating its customer list is attributable to updating the list for billing purposes. It would not be cost effective, the company asserts, to attempt to segregate costs applicable to its mailing list.

We are not persuaded that difficulties with cost allocation mean that no costs of maintaining mailing lists should be included in amounts charged to shareholders. Instead, we find that each utility using its bill inserts for political messages should determine costs attributable to maintaining and updating its customer mailing lists according to the following formula: at the end of each calendar year, each utility shall multiply the number of bills used for political messages divided by 12 (six if the company bills bi-monthly) times 50% of the cost of maintaining its billing list for such years. The amount and the revenue associated therewith shall be allocated and deferred in accordance with this order.

Third, the problem arises as to how costs, once allocated, are to be reflected in rates. Long Island Lighting Company believes that it will be possible to project allocated costs, as with other expenses in a rate proceeding. Other parties argue that costs should be deferred and treated in future rate proceedings.

While we normally would not establish a deferral account for expenses of this nature, projection of the frequency for which bill inserts are to be used for political purposes will be difficult to verify by the parties in a rate proceeding. In addition, the use of the billing process for political purposes is entirely within the discretion of a utility's management. Accordingly, we find that revenues providing for the cost of the billings containing inserts falling within the definition of Account 426.4 should be deferred and deducted from the revenue requirement in a utility's next rate case. Amounts deferred should also include the tax effects of the deferral.

The Commission Orders:

1. Each utility which mails bill inserts to its ratepayers must, if the bill inserts contain messages as defined in Account 426.4 (for electric and gas utilities) or Account 323.1 (for telephone utilities), charge the account with 50% of the costs of the mailing. All revenues (including any tax effects) associated with costs charged pursuant to this order will be placed in a deferred account. The deferred amounts shall be deducted from the utility's revenue requirement in its next rate proceeding.

2. This proceeding is closed.

By the Commission,

JOHN J. KELLIHER
Secretary

(SIGNED)

APPENDIX A

Borough of Manhattan and Long Island Consumer Action
Brooklyn Union Gas Company
Columbia Gas of New York, Inc.
Consolidated Edison Company of New York, Inc.
Empire State Petroleum Association, Inc.
Long Island Lighting Company
National Fuel Gas Distribution Corporation
New York State Consumer Protection Board
New York State Electric & Gas Corporation
New York Telephone Company
Rochester Gas & Electric Corporation
Thomas Suttmeier

Appendix F—Notice of Appeal to the Supreme Court of the United States, February 19, 1986

COURT OF APPEALS
STATE OF NEW YORK

No. 632

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE and ROCKLAND UTILITIES, INC., and ROCHESTER GAS AND ELECTRIC CORPORATION,

Appellants,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE AND ROCKLAND UTILITIES, INC., and ROCHESTER GAS AND ELECTRIC CORPORATION,

Appellants,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

Albany County
Clerk's Index
No. 12078-83

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE that Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, dated December 17, 1985, which affirmed the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, entered on March 13, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Dated: February 19, 1986

Very truly yours,

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Hon. Guy D. Paquin
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February 19, 1986
COURT OF APPEALS

OFFICE OF
ALBANY COUNTY CLERK
ALBANY, N.Y.
February 19 253 PM '86

(3)

Supreme Court, U.S.
FILED
MAR 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1407

IN THE

Supreme Court of the United States

October Term, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE AND ROCKLAND UTILITIES, INC., and ROCHESTER GAS AND ELECTRIC CORPORATION,

Appellants,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

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March, 1986

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33 pp

Questions Presented

1. Are a utility's First Amendment rights violated by a Commission ratemaking determination which does not limit or regulate the company's speech?

2. Does a utility have a First Amendment right to have ratepayers finance speech which is unnecessary to the rendition of utility service?

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IN THE

Supreme Court of the United States

October Term, 1985

No. 85-1407

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE AND ROCKLAND UTILITIES, INC., and ROCHESTER GAS AND ELECTRIC CORPORATION,

Appellants,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

Pursuant to Rule 16 of the Court's Rules, Appellee Public Service Commission of the State of New York ("Commission") hereby moves that either this appeal be dismissed on the ground it does not present a substantial federal question or that the judgment of the New York State Court of Appeals be affirmed.

Statement of the Case

A. Introduction

Under the New York Public Service Law, the Commission is charged with regulating electric, gas, telephone, and water utilities to ensure that essential public services are furnished to consumers at just and reasonable rates. In discharging its rate-setting responsibility, the Commission reviews and analyzes claimed operating expenses that utilities seek to recover in rates charged their customers. When costs are incurred for dual purposes (*e.g.*, utility and "non-utility" purposes) "a prime function of the Commission, as a regulatory body, is to separate those costs which should be borne by ratepayers from those which are properly chargeable to [the utility's] shareholders" *Rochester Gas & Elec. Corp. v. Public Service Comm. of State of N.Y.*, 51 NY2d 823 at 825 (1980), *appeal dismissed* 450 U.S. 961 (1981).

At issue in this appeal is a Commission ratemaking determination which merely "separates" the expenses of the customer bill mailing process between ratepayers and utility shareholders when such process is used jointly for "utility" purposes (*i.e.*, mailing bills to ratepayers) and "non-utility" purposes (*i.e.*, promoting the companies' political objectives through bill inserts). A description of the proceedings below follows.

B. Proceedings Before the Commission

In July of 1980, the Commission initiated a proceeding to examine the proper ratemaking treatment of costs associated with the utilities' use of inserts in the customer billing envelope. The Commission invited comments from interested parties addressing the manner

in which it could oversee the billing process "to accommodate both the bill inserts and the interests of the ratepayers who pay for the billing mechanism" (2a).[1] It sought specific comment on the question of whether "the use of the billing process by utility management for political purposes amounts to a subsidy forced to be supported by the ratepayers." *Id.* It also indicated it was interested in "methods of cost allocation between shareholders and ratepayers when the billing process is used to promote the interests of utility management" (9a) and it set forth several possible methodologies for allocating costs where such process is used for the "utility purpose" of sending customers their bills as well as for the "non-utility" purpose of promoting utilities' political objectives (9a-10a). Thereafter, the Commission received numerous comments on these issues, including those submitted by three of the Appellants herein.[2]

C. Commission Decision

By order adopted at its March 23, 1983 session (JSa18-23), the Commission determined that for ratemaking purposes, an allocation of the fixed costs of the bill mailing process was appropriate where such process was used jointly for the utility purpose of sending customers their bills and also for the non-utility purpose of

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[1] References to _____a are to the appendix to this motion to dismiss. References to JSa_____ are to the appendix to the Jurisdictional Statement.

[2] The Appellants alleged that allocation of any bill mailing expenses to shareholders would violate the Court's holding in *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530 (1980).

advertising or promoting utilities' political objectives.[3] In so ruling, the Commission found that (1) utility shareholders derive "an economic benefit by using the billing process (whose costs are paid for by ratepayers) as opposed to alternative means to disseminate political messages;" (2) the use of the bill mailing process to disseminate management's political views "provides a subsidy to utility management;" and (3) "when a billing is used both for service related functions and for management purposes, it may properly be considered a joint use with costs to be shared by both parties." (JSa20-21).

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[3] As indicated in the Commission's decision, and as used throughout this brief, the term "political objectives" or "political views" refers to communication falling within the language of long-standing Account 426.4 of the Uniform System of Accounts. 16 NYCRR, ch II, subch F, Account 426.4. This account is a "below the line," nonoperating account and when expenses are booked therein, they generally are not subject to recovery in rates and thus are borne by shareholders. See *Southwestern Elec. Power Co. v. Federal Power Comm.*, 304 F.2d 29 at 47 (5th Cir., 1962), *cert. denied* 371 U.S. 924; see also *Alabama Power Co. v. Federal Power Comm.*, 482 F.2d 1208 at 1217, footnote 21 (5th Cir., 1973). The language of this account is as follows:

4[illegible] Expenditures For Certain Civic, Political and Related [illegible]tivities

[illegible]ount shall include expenditures for the purpose of [illegible]ıg public opinion with respect to the election or [illegible]ent of public officials, referenda, legislation, or [illegible]ces (either with respect to the possible adoption of new [illegible]enda, legislation or ordinances or repeal or modification of [illegible]ing referenda, legislation or ordinances) or approval, [illegible]dification or revocation of franchises; or for the purpose of [illegible]nfluencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

Having determined that an allocation of bill mailing costs was appropriate, the Commission then analyzed the various methodologies by which such allocation could be implemented in the context of its ratemaking proceedings. Ultimately, it determined that where the bill mailing process is used for both the utility purpose of rendering customers their bills and also for the non-utility purpose of promoting the companies' political objectives, 50% of the fixed costs of such process (*i.e.*, postage, envelopes, processing and mailing list costs) should be allocated to various "utility" accounts and 50% to a "below-the-line," "non-utility" account (JSa22-23). The effect of this accounting treatment is to apportion these costs equally between ratepayers and shareholders when the bill mailing process is used for both utility and non-utility purposes.

D. Proceedings in the New York Courts

The utilities appealed the Commission's decision on various grounds and by decision issued January 26, 1984, the New York State Supreme Court, Special Term, dismissed their petition (JSa13-16). The Court found that the Commission's cost allocation decision was not a penalty or tax, that such decision did not restrict the utilities from using the bill mailing process as a means of promoting their shareholders' political objectives, and that the companies were "merely being asked to bear an equitable share of the costs of the mailing when they use bill inserts which are primarily for the benefit of stockholders." *Id.*

On appeal to the New York State Supreme Court, Appellate Division, the Court (3-2) affirmed the judgment below (JSa5-12). The Court held that the Commission "is empowered to consider the 'nonutility' use of assets . . . or the nonutility nature of company

expenditures" and that it can "take appropriate rate-making action to ensure that ratepayers are not compelled to pay for the cost of such activities or expenditures." *Id.* The Court also found that the Commission had rationally resolved "a complex cost allocation issue" and that its decision "merely holds that when a utility bootstraps its message onto a vehicle fully paid for by the recipient customers, it should then share equally in the cost of that mailing."[4] *Id.*

The New York State Court of Appeals unanimously affirmed the judgment (JSa1-4). Recognizing that a prime function of the Commission "is to separate those costs which should be borne by ratepayers from those which are properly chargeable to shareholders," the Court found that in allocating bill mailing costs, the Commission was "only implementing its statutory and regulatory mandate" (JSa3-4). It also held that the Commission's decision was "a proper attempt to balance competing First Amendment interests of the shareholders and the ratepayers" and that if the costs "were not allocated the ratepayers might have cause to complain that they were being compelled to subsidize and support the speech of the utilities in violation of the rule in *Abood v. Detroit Bd. of Education* (431 U.S. 209) and *Wooley v. Maynard* (430 U.S. 705)." *Id.*

The utilities thereafter filed the instant appeal. For the reasons set forth *infra*, the appeal should be dismissed for lack of a substantial federal question or the judgment of the New York State Court of Appeals should be affirmed.

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[4] Appellants' assertion that the Court found the Commission's cost allocation order to be a "content-neutral restriction of speech" (Juris. Statement, p. 6) is incorrect. The Court expressly recognized that the "order in no way restricts petitioners from utilizing bill packet inserts to disseminate their views on controversial subjects" (JSa9).

ARGUMENT

I. The First Amendment Does Not Entitle Utilities To Recover In Rates Communicative Expenses Which Are Unnecessary To The Rendition Of Utility Services.

The Commission determined that when the bill mailing process is used both for the service-related purpose of delivering customers their bills—and also for the nonservice-related, "nonutility" purpose of advertising or promoting utilities' political objectives—the expenses of the process should be allocated equally between ratepayers and shareholders to reflect the dual use. The rationale for this decision is straightforward.

First, it is based on the fact that when the billing process is used for both service related purposes and nonservice-related, non-utility purposes (*i.e.*, promotion of utilities' political objectives), the process is transformed for ratemaking purposes into a "joint use" with costs properly being allocated between the two uses. The Commission is clearly empowered to allocate costs based on a joint use of utility plant—and to recognize the "non-utility" nature of claimed expenses—to ensure that jurisdictional rates reflect only those costs that are necessarily related to the utility services being furnished to consumers. See, *e.g.*, *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 280 (1976); *Colorado Interstate Co. v. FPC*, 324 U.S. 581, 586-591 (1945); *Panhandle Co. v. FPC*, 324 U.S. 635, 641-642 (1945); *Groesback v. Duluth, South Shore & Atlantic Ry.*, 250 U.S. 607, 614-615 (1919) (all four cases recognizing the propriety of allocating costs of jointly-used utility plant for jurisdictional ratemaking purposes); see also *Rochester Gas & Elec. Co. v. Public Serv. Comm. of State of N.Y.*, 51 NY2d 823, 825 (1980), *appeal dismissed* 450 U.S. 961 (1981) (upholding Commission

disallowance of communicative expenses found "unnecessary to the rendition of utility service"); *Matter of New York Tel. Co. v. Public Serv. Comm. of State of N.Y.*, 64 AD2d 232, 247-248 (App. Div., 1978), *appeal denied* 46 NY2d 710; *Matter of New York Water Serv. Corp. v. Public Serv. Comm. of State of N.Y.*, 12 AD2d 122 (App. Div., 1960), *appeal denied* 10 NY2d 705 (both cases upholding Commission disallowance of expenses found to be "non-utility" in nature).

Second, the Commission's decision is based on a long-established policy, which is followed by many other utility regulatory bodies *and which is not challenged here by the utilities*, that expenses related to a utility's efforts in advertising or promoting its political objectives are not necessary costs of service and should not, therefore, be borne by monopoly ratepayers. See, *e.g.*, New York State Public Service Commission, Uniform System of Accounts, Account 426.4, 16 NYCRR, ch II, subch F (requiring electric utilities to book political expenditures in this "below-the-line," nonoperating account, thereby assigning such costs to shareholders); N.Y. Pub. Serv. Law, §114-a (providing that in "determining rates to be charged customers, the Commission shall not include the cost of legislative lobbying on behalf of any public utility"); 16 U.S.C. §§2623(b)(5), 2625(h)(1)(b) (requiring States to consider adopting standard prohibiting utilities from recovering from ratepayers any "direct or indirect" expenditure relating to utilities' political advertising); Federal Energy Regulatory Commission, Uniform System of Accounts, Account 426.4, 18 C.F.R. Part 101 (requiring electric utilities to book political expenditures in this "below-the-line," nonoperating account, thereby assigning such costs to shareholders).

And notwithstanding the Appellants' assertions, it is obvious that without an allocation of costs here, ratepayers *would* be bearing, in a very real sense, expenses of utilities' political advertising. This is because the ratepayers finance the bill mailing process, and the shareholders' use of such process—without contributing to any of its fixed costs—would confer a substantial economic benefit on them which would effectively constitute a ratepayer subsidy.[5]

[5] Appellants argue that because enclosure of their political advertising material in the billing envelope does not normally impose any *additional costs* on ratepayers, there is no ratepayer subsidy or support of their political activities. Juris. Statement, pp. 12-16. This argument is devoid of merit because it is based on a narrow, *incrementalist* analysis which conveniently (and by definition) ignores the fixed overhead costs of the bill mailing process (*i.e.*, postage, envelopes, processing and mailing list costs). These fixed costs are just that, *fixed costs*, and they are indisputedly present during those months when shareholders make use of the billing process to promote their political objectives. The companies offer no rational explanation for their theory that the First Amendment requires the Commission to ignore the existence of these fixed costs for allocation purposes and thereby grant shareholders a "free ride" for the promotion of their political objectives. See *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. at 548-555 (BLACKMUN, REHNQUIST, J.J., dissenting); *cf.* 447 U.S. at 543 (opinion of POWELL, J.) and 447 U.S. at 544 (MARSHALL, J., concurring). In fact, as recognized by Justice Marshall (concurring) and Justice Stevens (dissenting) in *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Calif.* (_____ U.S. _____, Feb. 21, 1986), the utility in that case conceded that the state regulatory commission could legally "make reasonable allocations of cost" when there was a shareholder use of the bill mailing process. *Id.*, Brief of Appellant, p. 39.

II. The Commission's Cost Allocation Determination Does Not Restrict The Utilities' First Amendment Rights.

The Appellants' entire First Amendment argument is premised on their assertion that the Commission's cost allocation decision is a content-based *restriction or suppression of speech*. See, *e.g.*, Juris. Statement, pp. 9-12. It is apparent, however, that the Commission has not restricted, limited, or regulated the companies' speech. In fact, it is *undisputed* that the utilities may enclose their shareholders' political material in the billing envelope each and every month of the year if they so desire. Thus, the assertions that the Commission is "suppress[ing] the utilities' speech on public issues" and "choosing which issues are worth discussing or debating" are demonstrably without merit.[6] (Juris. Statement, pp. 5, 9).

That the Commission's ratemaking treatment of costs here does not constitute a cognizable restriction of the utilities' First Amendment rights is demonstrated by *Rochester Gas & Elec. Co. v. Public Serv. Comm. of State of N.Y.*, 51 NY2d 823 (1980), *appeal dismissed* 450 U.S. 961 (1981). In that case, the Commission disallowed rate recovery of certain of the utility's communicative expenses which were determined to be "unnecessary to the rendition of utility services." The

[6] Appellants' argument that by allocating costs the Commission imposes a "financial penalty" on their speech is equally meritless. Juris. Statement, p. 9. The Commission is routinely called upon to allocate costs when a joint or non-utility use of utility plant is present; indeed, such allocations are an integral part of the ratesetting process. As such, the allocation of costs for ratemaking purposes cannot accurately be characterized as a penalty. See *Southwestern Elec. Power Co. v. Federal Power Comm'n.* 304 F.2d 29, 47 (5th Cir., 1962), *cert. denied* 371 U.S. 924 (1962).

company argued that by not allowing rate recovery of these expenses (and thereby effectively requiring shareholders to bear them), the Commission was restricting its free speech rights. The New York State Court of Appeals rejected this argument, recognizing that mere ratemaking disallowance of communicative expenses does not constitute a restriction or limitation of a utility's First Amendment rights.

> There is no doubt that petitioner's expressional activity is entitled to First Amendment protection (see, *e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557). *But the Public Service Commission in this case has imposed no restraint, direct or indirect, upon petitioner's advertising or communications.* Instead, the Commission has merely refused to include a portion of petitioner's informational advertising as an allowable expense, and determined that such costs should be paid by the utility's shareholders. . . . Petitioner claims, in essence, that it has a constitutional right to have the ratepayers defer the entire cost.
>
> It is an accepted principle that although the Constitution may provide a citizen the right to engage in a certain activity free of governmental restrictions, it places no general corresponding duty upon government to ensure the availability of all resources necessary to realize that freedom (see, *e.g., Harris v. McRae*, 448 U.S. 297; *Norwood v. Harrison*, 413 U.S. 455, 462). Thus, the Public Service is not obliged to allow the utility to charge ratepayers for all communications which the utility may choose to make. (*Id.*, 51 NY2d at 825) (emphasis added).

The company's appeal to this Court (where it made the identical argument) was dismissed for lack of a substantial federal question. *Id.*, 450 U.S. 961 (1981).

In *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (involving denial of certain tax exempt status to nonprofit corporations engaged in the protected First Amendment activity of political lobbying), the Court again recognized that government does not restrict First Amendment rights by declining to ensure that the exercise of such rights is subsidized:

> TWR contends that Congress' decision not to subsidize its lobbying violates the First Amendment . . . Congress has merely refused to pay for the lobbying out of public moneys. . . . In these cases, as in *Cammarano* Congress has not infringed any First Amendment rights or regulated any First Amendment activity . . . Congress has simply chosen not to pay for TWR's lobbying. We again reject 'the notion that First Amendment rights are somehow not fully realized, unless they are subsidized by the State.' (*Id.*, 461 U.S. at pp. 545-546).

One final point illustrates the flawed nature of Appellants' First Amendment argument. The companies do *not* challenge (on First Amendment grounds or otherwise) the constitutionality of Account 426.4 of the Uniform System of Accounts which, as discussed *supra*, requires shareholders to bear the costs of utilities' political activities. See *Southwestern Elec. Power Co. v. Federal Power Commn.*, 304 F.2d 29, 47 (5th Cir., 1962), *cert. denied* 371 U.S. 924 (1962). Having conceded the propriety of requiring shareholders to finance utilities' political activities, it makes no sense for Appellants to challenge the Commission's cost allocation decision; for such decision merely recognizes that mailing expenses are part of the costs involved in a shareholder use of the billing process for political purposes.

Conclusion

For the reasons stated, the appeal should be dismissed for lack of a substantial federal question or the judgment of the New York State Court of Appeals should be affirmed.

Respectfully submitted,

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March, 1986

APPENDIX

Appendix A—Order of the Public Service Commission of the State of New York, July 16, 1980

Appendix B—Order of the Public Service Commission of the State of New York, December 16, 1980

Appendix A—Order of the Public Service Commission of the State of New York, July 16, 1980

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on July 16, 1980.

COMMISSIONERS PRESENT:

Charles A. Zielinski, Chairman
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead
Karen S. Burstein
Richard S. Bower

CASE 27805—Proceeding on Motion of the Commission as to the Use of Bill Inserts and Promotion of Electricity.

ORDER INSTITUTING PROCEEDING

BY THE COMMISSION:

On June 20, 1980, the United States Supreme Court, on the basis of the record before it, invalidated orders of the Commission (1) banning the use of bill inserts as a mechanism for the dissemination of the utility's position on controversial matters of public policy and (2) banning promotion of electricity through the use of advertising. The Court, however, did not preclude further regulation of bill inserts and promotional advertising so long as the regulation does not violate the free speech guarantee of the First Amendment to the United States Constitution. Before taking any action with respect to either promotional advertising or the use of bill inserts, we are

requesting comments from the parties as to what possible directives are required to assure that the public interest sought to be advanced by our invalidated orders continues to be protected.

Bill Inserts

Our order banning bill inserts made it unnecessary for us to consider how to regulate the billing process to accommodate both the bill inserts and the interest of the ratepayers who pay for the billing mechanism. That matter is left open in the wake of the Supreme Court's decision invalidating our prohibition. We invite the parties to submit views on what regulations, if any, are necessary and permissible, with respect to controversial bill inserts.

The Commission believes that there are at least five issues requiring comment from the parties.

First, does the use of the billing process by utility-management for political purposes amount to a subsidy forced to be supported by the ratepayers? If so, what is the extent of the subsidy, should it be eliminated and how can it be eliminated?

In connection with these issues, we invite comments and information with respect to the cost and effectiveness of various forms of communication including not only bill inserts, but also alternative means of informing the public such as newspapers, radio and television.

Second, the Supreme Court noted that a customer who finds a political message offensive may simply throw it away. If all messages are lumped together, the customer will also throw away any valuable consumer information.

Should the Commission require that messages on bill inserts that relate to utility service information *e.g.*, consumer rights, conservation measures, or new rate filings be isolated from other messages the utility chooses to present? How can this be accomplished?

Third, is it practical to allow customers who do not desire to receive controversial messages to so choose and require utilities not to send such messages to them? Can this be done without depriving them of other utility service-related information also included in bill inserts?

Fourth, if a utility sends messages advocating its point of view on controversial matters should the billing packet be opened to other parties with opposing views? When we imposed our bill insert ban we rejected a request to include an anti-nuclear power bill insert along with a Consolidated Edison Company of New York, Inc. billing. Is that decision still reasonable, or required, where utilities may use the billing process to express their views? If the billing packet is to be opened to outside parties, how would competing claims for space be evaluated?

Fifth, would it be appropriate for the Commission to ban *all* bill inserts regardless of their content or does the Supreme Court's decision or the utilities' obligations to disseminate consumer-related information under the Public Service Law preclude this action?

Appendix A--Order of the Public Service Commission of the State of New York, July 16, 1980.

We invite comment on these specific issues and any other questions relevant to further Commission action that interested parties may wish to raise. Pending our resolution of this proceeding, utilities may use bill inserts to disseminate their managements' views on controversial matters. We reserve the right, however, to do whatever is required to treat political bill inserts issued during the pendency of this proceeding consistently with our final order.[1]

Promotional Advertising

The Supreme Court invalidated our ban on promotional advertising because it included promotion of usage that might result in more efficient or equally efficient use of energy resources. It also determined that we had not demonstrated that our goal of energy conservation could not be accomplished through less restrictive means than a ban on advertising *e.g.*, by requiring inclusion of information about relative costs and efficiencies of the advertised usage. The Court also suggested that the Commission "...consider a system of previewing advertising campaigns to insure that they will not defeat conservation policy..."

Before taking any further measures to control promotional advertising, we desire the comments of the parties on the issues not resolved by the Supreme Court's decision. Comments should be submitted on whether and under what circumstances the Commission may be required to reinstitute its ban on advertising.

[1] For example, our final order may have cost allocation implications and/or impose responsibilities for accommodating responses by parties with opposing views.

Appendix A—Order of the Public Service Commission of the State of New York, July 16, 1980.

Should advertising that is contrary to our goal of energy conservation; *i.e.*, advertising of usage and appliances that use more energy than alternatives be banned or can our energy conservation objectives be accomplished through less restrictive means, for example, by requiring inclusion of information about relative costs and efficiencies of the advertised usage. Also, we desire comments on whether and under what circumstances a system of previewing advertising campaigns should be instituted. If the Commission were to institute a previewing program, what measures would need to be taken to provide for objective judgments as to whether particular advertisements required alteration before their publication.

The Commission Orders:

1. A proceeding is hereby instituted:

   (a) to consider the use of bill inserts by utility managements to disseminate their positions on controversial issues of public policy. The parties are invited to include comments on the matters outlined above as well as other relevant issues;

   (b) to consider whether action is necessary to regulate the use of promotional advertising by electric utilities in order to achieve the Commission's objective of conservation of energy resources. The parties are invited to submit comments on the matters outlined above as well as any other relevant issues.

Appendix A—Order of the Public Service Commission of the State of New York, July 16, 1980.

2. Any party desiring to submit comments in accordance with the invitation in paragraph 1 is required to send twenty copies in the case of utilities and three copies in the case of other parties to the Commission's Secretary no later than September 7, 1980.

3. This proceeding is continued.

By the Commission,

(SIGNED) SAMUEL R. MADISON
Secretary

Appendix B—Order of the Public Service Commission of the State of New York, December 16, 1980

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on December 16, 1980.

COMMISSIONERS PRESENT:

Charles A. Zielinski, Chairman
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Richard S. Bower

CASE 27805—Proceeding on Motion of the Commission as to the Use of Bill Inserts and Promotion of Electricity.

BY THE COMMISSION:

At the session of July 19, 1980, the Commission instituted this proceeding to consider further what action, if any, was required following decisions by the United States Supreme Court invalidating Commission orders (1) banning the use of bill inserts as a mechanism for the dissemination of a utility's position on controversial matters of public policy; and (2) banning promotion of electricity through the use of advertising. The Commission asked for comments by September 7, a deadline which was extended to October 7 at the request of several parties. A list of those submitting views is appended.

Appendix B—Order of the Public Service Commission of the State of New York, December 16, 1980.

Our review of the parties' responses and the previous Commission proceedings addressing advertising and bill inserts leads us to conclude that little purpose will be served by extensive Commission involvement in these areas. We continue to be concerned that ratepayers receive information relating to utility service and that bill inserts provide such information in a clear and readable manner. Accordingly, we will monitor utility bill inserts to see whether customer service-related information is being omitted, minimized or otherwise affected adversely in any way, including subordination of such information to messages by utility management espousing the utilities' position on controversial issues of public policy. If we find that service-related information is being affected adversely, we will not hesitate to take action to correct the problem.

Our order instituting this proceeding requested comments on whether use of the billing process by utility management for political purposes amounted to a forced subsidy from ratepayers and, if so, how to deal with the subsidy issue. We are persuaded, based on our review of the comments of the parties, that we should consider further the subsidy problem; but, since we offered no specific proposals in our order, we will offer an additional opportunity for comment on some.

We are specifically concerned about the methods of cost allocation between shareholders and ratepayers when the billing process is used to promote the interests of utility management. Several issues must be considered, including the threshold question of whether a fair and proper allocation of costs can be made at all. It would be

senseless to adopt a process that diverted substantial staff resources away from more important regulatory responsibilities to endless examinations of specific messages in order to allocate precisely the costs of using the billing process between shareholders and ratepayers.

The Commission's Uniform System of Accounts already provides that the cost of using the billing process for political purposes (*i.e.*, the printing of the specific message and associated costs) shall be allocated to the shareholders. Beyond that, however, we are considering the possibility of allocating additional costs to the shareholders. Comments are requested upon the desirability, including the difficulty of implementation, of the following approaches to cost allocation:

1. allocation of so much of the cost to shareholders as a third party would be willing to pay to distribute its material with the utilities' bills;

2. allocation of the full costs of a mailed bill and insert, according to a set formula, between shareholders and ratepayers when the bill insert contains political messages. In this case, costs to be allocated would include: stamps, envelopes, processing costs and the cost of assembling and updating ratepayer mailing lists;

3. allocation of cost to shareholders that the utility avoids by using inserts rather than another advertising medium; and

4. allocation of all the costs of a mailing to the shareholders if the mailing contains a political message.

Appendix B—Order of the Public Service Commission of the State of New York, December 16, 1980.

In addition, we invite comments on how to implement cost allocation schemes in the context of a rate proceeding. Should the past experience of a utility with respect to the use of the billing mechanism for political purposes be used to adjust rate year mailing costs, or is there another way to adjust the revenue allowance to eliminate the costs to be allocated?

With respect to promotional advertising, the Commission also requested comments on what, if any, regulations should be adopted. We are persuaded, based on our review of the comments of the parties, that no further Commission involvement is necessary at this time. We will continue monitoring promotional advertising practices of utilities with a view toward determining whether advertisements run contrary to our goal of energy conservation or otherwise interfere with the utilities' obligation to provide safe and adequate service at the lowest possible rates. If abuses should appear, we will treat them as they occur.*

The Commission Orders:

1. Any party desiring to submit comments on cost allocation methods and related matters with respect to the use of bill inserts by utility management for political purposes is required to send twenty copies in the case of utilities and three copies in the case of other parties to the Commission's Secretary no later than February 2, 1981.

* As a related matter, we have requested comments in Case 27847 on whether we should apply the standard specified in Section 113 of the Public Utility Regulatory Policies Act and assign costs of promotional advertising to the utilities' shareholders.

Appendix B—Order of the Public Service Commission of the State of New York, December 16, 1980.

2. This proceeding is continued.

By the Commission,

SAMUEL R. MADISON
Secretary

(SIGNED)

Supreme Court, U.S.
FILED
MAR 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1407

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE AND ROCKLAND UTILITIES, INC., AND ROCHESTER GAS AND ELECTRIC CORPORATION,

Appellants,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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OCTOBER TERM, 1985

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Appellants,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellants submit this brief in opposition to the Motion to Dismiss Appeal or Affirm Judgment Below ("motion") submitted by the Appellee Public Service Commission of the State of New York (the "Commission").

The Commission's motion erroneously portrays this case as involving merely the review of a routine ratemaking order by which it is simply disallowing "expenses which are *unnecessary* to the rendition of utility services" (motion, p. 8) (emphasis added).

The Commission's motion is based on an erroneous premise. The disallowed costs are *necessary* costs of providing utility services; it cannot be seriously contended that the disallowed costs need not be incurred by the utilities in order to mail bills to their customers.* That being the case, the issue is whether the disallowance of these *necessary* billing expenses, solely because of the content of the messages the utilities put into their billing envelopes, at no cost to their customers, unconstitutionally penalizes the utilities' exercise of their freedom of speech.

CONCLUSION

The Commission's motion should be denied and, for the reasons stated in our jurisdictional statement and herein, probable jurisdiction should be noted.

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* Thus, *Rochester Gas and Electric Corp. v. Public Service Commission*, 51 N.Y.2d 823 (1980), *appeal dismissed*, 450 U.S. 961 (1981), so heavily relied on by the Commission (motion, pp. 8-9, 11-12) is, whatever its merits, inapposite for the reasons stated in the appellants' jurisdictional statement (p. 11n.).

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